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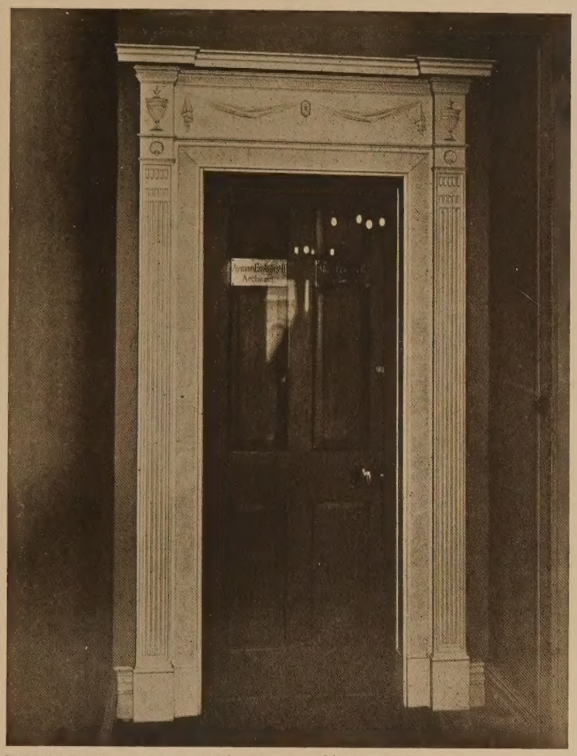
Owing to the request of the New York Architects we have decided to continue our informal Registration Bureau for Draughtsmen and will endeavor to supply, gratis, a man suitable for your special needs.

We ask you to co-operate with us and notify us when you employ a man through this Bureau so that his name may be taken from our list We wish to avoid the confusion that has, hitherto, arisen through the carelessness of the draughtsmen in this respect.

All draughtsmen of good standing are invited to register when in want of a position. There is no charge.

HOUSE, D. E. POMEROY, ENGLEWOOD, N. J.—This is the first house built from Mr. Embury's designs, 1903.

Aymar Embury II, Architect.



ENTRANCE TO MR. EMBURY'S OFFICE, 132 MADISON AVE., NEW YORK.

THE WORK OF AYMAR EMBURY II.

THE architect of today whose greatest work is before him must possess the power of interpretation of his art to his clients, so that they will say, "This is good. This house seems to mean a little more, seems to say a little more, than others, and if the man who did that can so make the house to speak, he can probably express me better than another can."

It is not archaeology, but life, that is wanted.

Of course this thought of success consisting in doing the thing just a little bit better than most, we find in many a proverb, but it is increasingly true in architecture where ability is more and more the determining factor in successful practice, adding of course the contributing factors of an agreeable personality and competent knowledge on the so-called practical side. To name some of the younger architects who must readily come to mind as men of promise would be invidious. Among them, Aymar Embury II is somewhat unique in having attained a very considerable reputation through a practice composed largely of small units. He has painstakingly sought the perfection of the small and medium-sized country house and considered it worthy of being treated with the logical processes of our ancestors.

After diligent study of all the old types of our American building he has succeeded in placing their spirit in the front of his mind, and their molding sections in the back, and says, "I think this is what they would have done if they had happened to think of it"; or "if they had had our facilities of manufacture," as to the particular problem in hand.

Mr. Embury has taken special delight in the Dutch work remaining in the little villages and countryside near his home in northern New Jersey, feeling that these buildings most consistently show the adaptation of means to ends He explains the situation in this way: "It is only a comparatively few American architects who for some reason have had the old Dutch work directly called to their attention, that have endeavered to work out a new application of the old methods."

It is from these derivatives that more of his work has ben done than in any other one style. He has led in the development of the pergola-porch in which the garden is united with the house by the porch treatment of projecting beam ends and cross-pieces, which either actually carry vines, or give the suggestion that they are a garden feature.

It is not a matter of remark when an architect turns out one or two attractive and liveable houses; but when he produces a great volume of work having such general excellence and a consequent large number of happy clients, there can be no doubt of the existence of some special gift in solving the problems. Mr. Embury demonstrates an ability to work in a style without creating the impression of sameness. His houses never lack individuality. Each one stands out as the home of a particular owner.

The public interest in good country building shown in so many magazines has enabled Mr. Embury to extend his audience, having fortunately the pen of a ready writer. This has had the natural result of maintaining an inflow of work which a practice of this character requires, and by the grasp that is shown in these informal talks, as well as in his books and critical articles, one may predict a larger recognition in the execution of more monumental work.

PIAZZA, HOUSE, RALPH PETERS, GARDEN CITY, L. I.
Aymar Embury II, Architect.

HOUSE, RUPERT HUGHES, BEDFORD HILLS, N. Y.

Aymar Embury II, Architect.

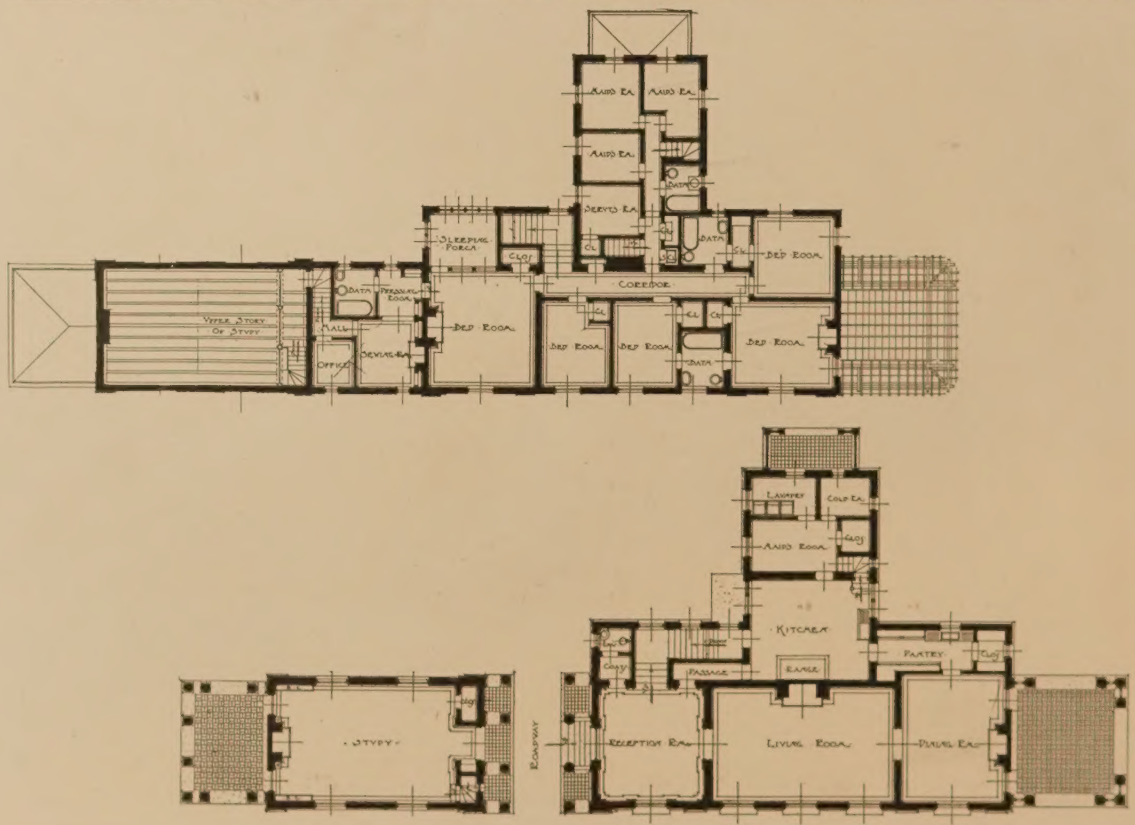
HOUSE, RUPERT HUGHES, BEDFORD HILLS, N. Y.

Aymar Embury II, Architect

DINING ROOM FROM LIVING ROOM, AND STUDY, HOUSE, RUPERT HUGHES, BEDFORD HILLS, N. Y.

Aymar Embury II, Architect.

STUDY AND LIVING ROOM, HOUSE, RUPERT HUGHES, BEDFORD HILLS, N. Y. Aymar Embury II, Architect.



RECEPTION ROOM AND PLANS, HOUSE, RUPERT HUGHES, BEDFORD HILLS, N. Y. Aymar Embury II, Architect.

BUNGALOWS, SOUTHERN PINES, N. C. Aymar Embury II, Architect.

HIGHLAND PINES INN, SOUTHERN PINES, N. C.

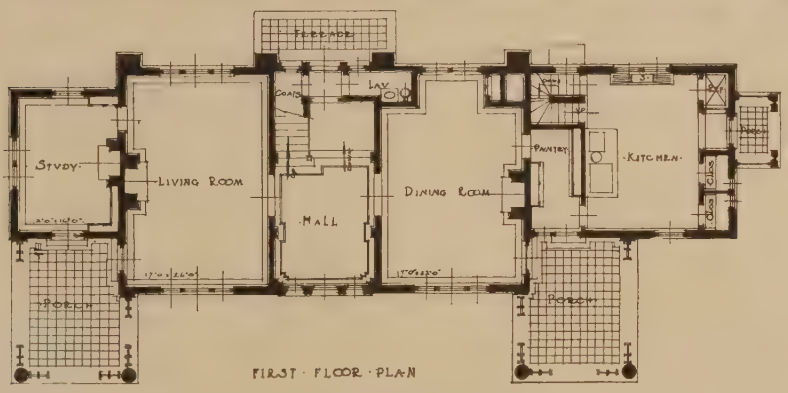
Aymar Embury II, Architect

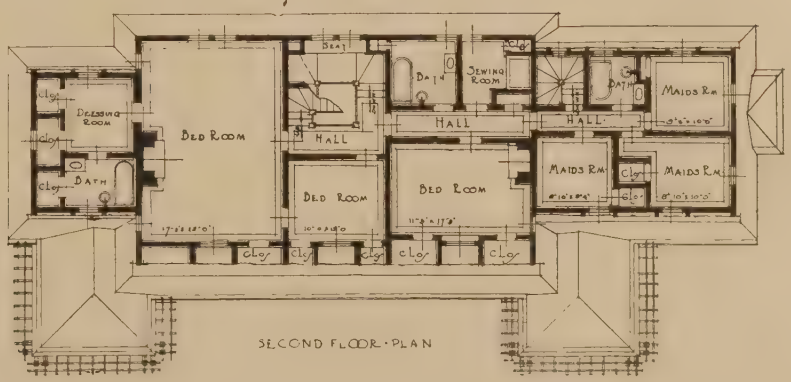
DETAILS, HIGHLAND PINES INN, SOUTHERN PINES, N. C

Aymar Embury II, Architect.

HOUSE, CHARLES J. FAY, DONGAN HILLS, S. I. (See "ARCHITECTURE" Series of Measured Details No. 15).

Aymar Embury II, Architect





DETAIL AND PLANS, HOUSE, CHAS. J. FAY, DONGAN HILLS, S. I. Aymar Embury II, Architect

HOUSE, MARSHALL FRY, SOUTHAMPTON, L. I. Aymar Embury II, Architect

REAR VIEW, HOUSE, MARSHALL FRY, SOUTHAMPTON, L. I.

Aymar Embury II, Architect.

FIRST FLOOR PLAN

SECOND FLOOR PLAN

DINING ROOM AND PLANS, HOUSE, MARSHALL FRY, SOUTHAMPTON, L. I. — Aymar Embury II, Architect.

COTTAGES FOR CHAUFFEUR AND GARDENER, STANLEY G. FLAGG, VILLA NOVA, PA. Aymar Embury II, Architect.

HOUSE, J. W. SEEER, ENGLEWOOD, N. J. (Plans page 208).

Avmar Embury II, Architect

HOUSE, GEO. M. TAYLOR, MILLBURN, N. J. (Plans page 208).

Aymar Embury II, Architect.

HOUSE, F. P. CLARKE, GARDEN CITY, L. I. (Plans page 208).

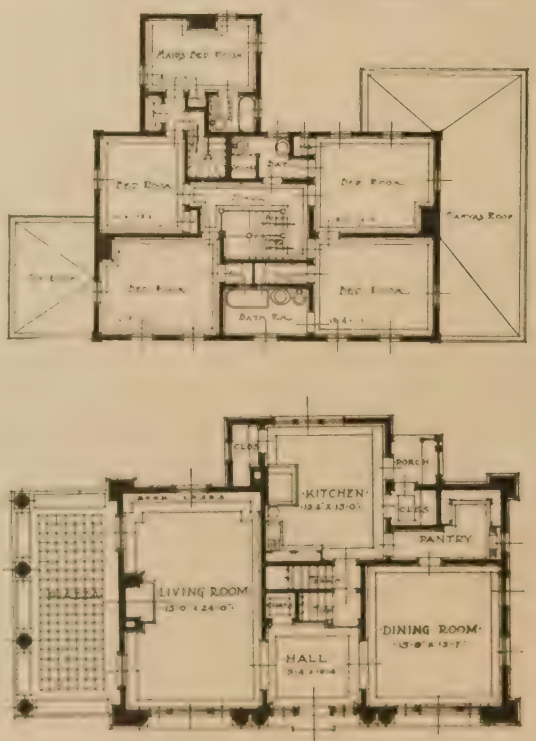
Aymar Embury II, Architect.

HOUSE, JEROME C. BULL, TUCKAHOE, N. Y. (Plans page 208).

Aymar Embury II, Architect.

PLANS, HOUSE, E. M. SPEER, ENGLEWOOD, N. J. (See page 204)

PLANS, HOUSE, GEO. M. TAYLOR, MILLBURN, N. J. (See page 205)



PLANS, HOUSE, F. P. CLARKE, GARDEN CITY, L. I. (See page 206).

PLANS, HOUSE, J. C. BULL, TUCKAHOE, N. Y. (See page 207).

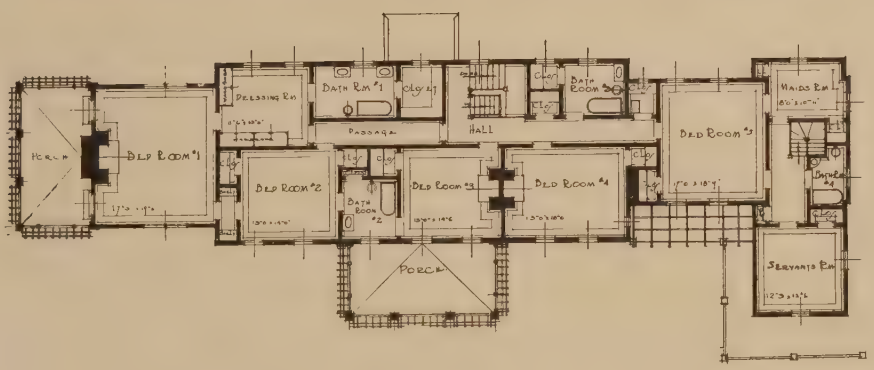
HOUSE, F. E. RICHART, WELLSVILLE, N. Y. Aymar Embury II, Architect.

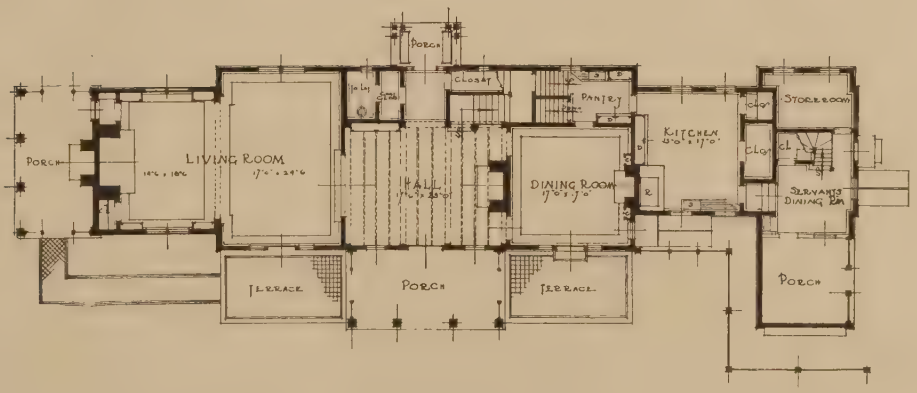
HOUSE, H. B. CLARK, NEW CANAAN, CONN. Aymar Embury II, Architect

DETAILS, PORCHES, HOUSE, H. B. CLARK, NEW CANAAN, CONN

Aymar Embury II, Architect.

LIVING ROOM AND HALL, HOUSE, H. B. CLARK, NEW CANAAN, CONN. Aymar Embury II, Architect.

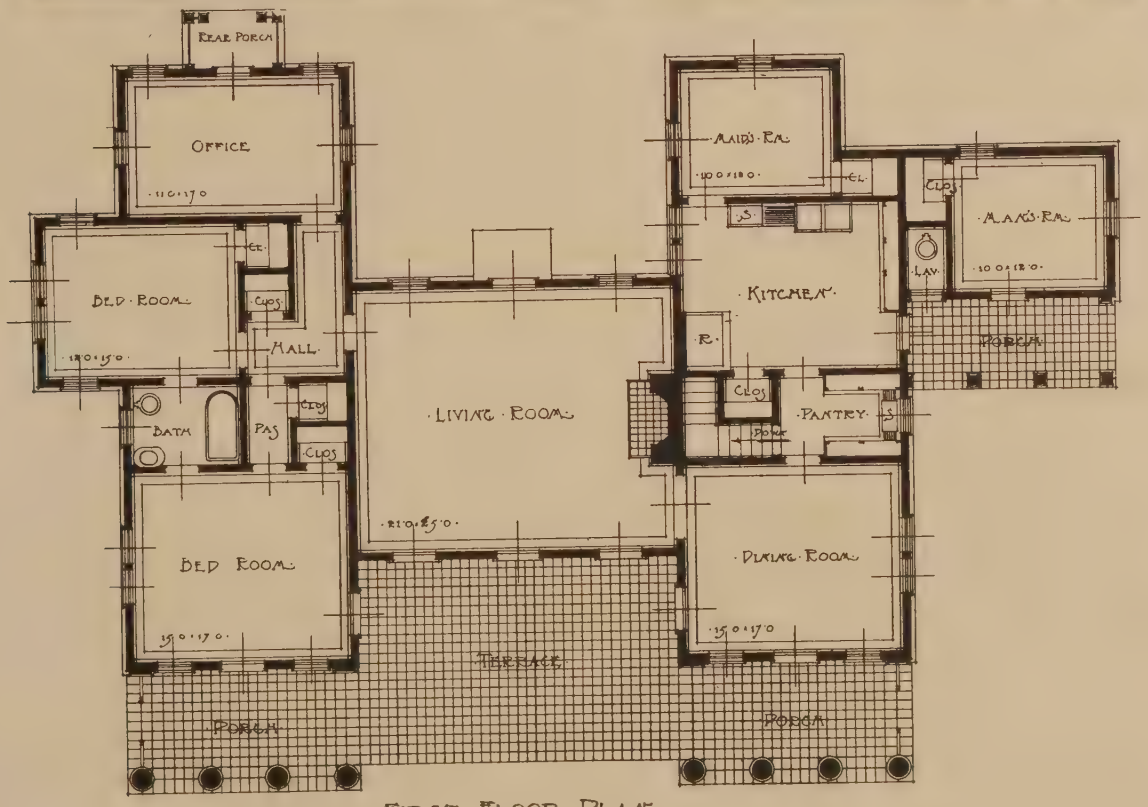




DINING ROOM AND PLANS HOUSE, H. B. CLARK, NEW CANAAN, CONN. Aymar Embury II, Architect

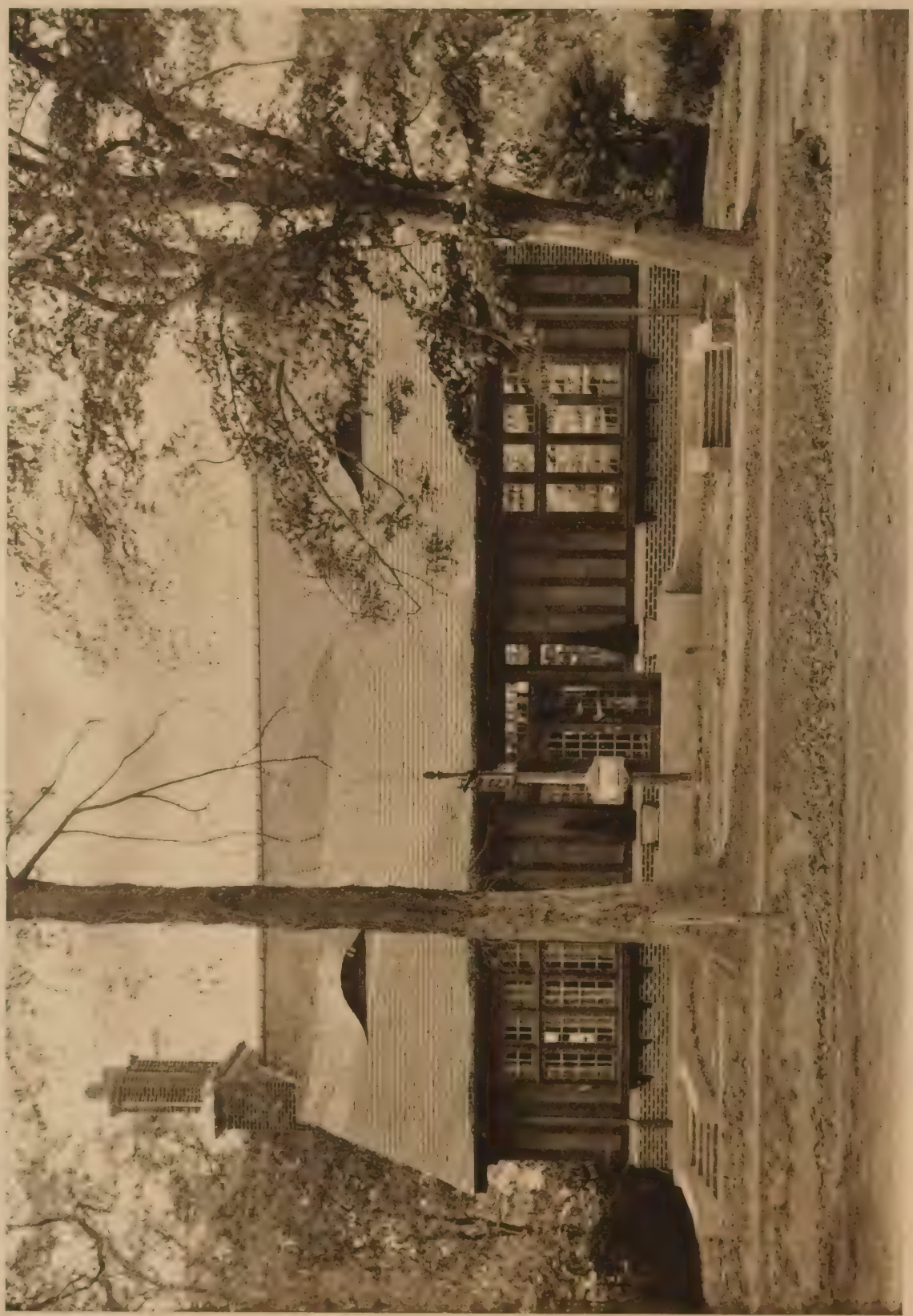
HOUSE, ST. GEORGE BARBER, SOUTH RIVER, MD

Aymar Embury II, Architect

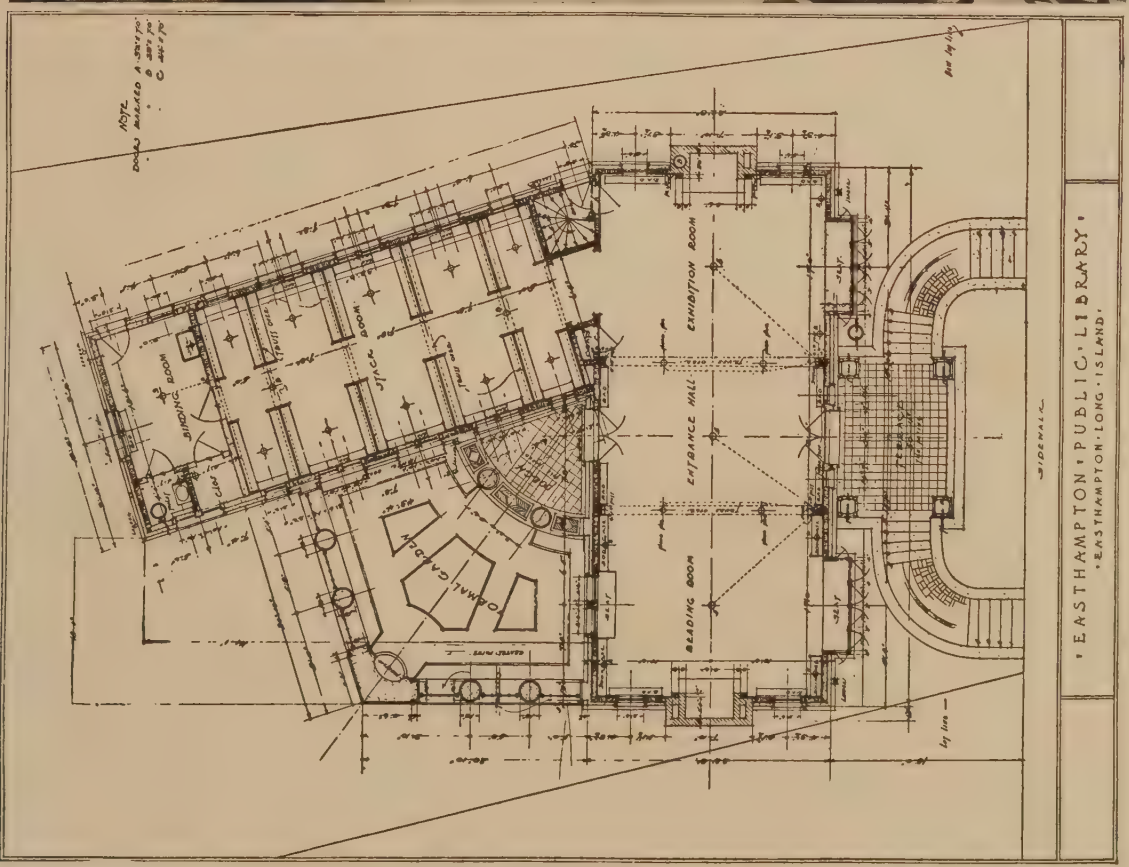


FIRST FLOOR PLAN

PORCH DETAIL AND PLAN, HOUSE, ST. GEORGE BARBER, SOUTH RIVER, MD. Aymar Embury II, Architect.



Aymar Embury II, Architect.



LIBRARY COURT AND PLAN, PUBLIC LIBRARY, EASTHAMPTON, LONG ISLAND — Aymar Embury II, Architect.

DOORWAYS.

Aymar Embury II, Architect.

DOORWAYS.

Aymar Embury II, Architect.

CRAM, GOODHUE & FERGUSON.

IT is a matter of surprise and regret to the profession to receive the announcement of the break-up of the firm of Cram, Goodhue & Ferguson, which, for so many years has been the leader of the Gothic movement in this country. For a long time the architects, at least, have been able to distinguish the marked difference between Mr. Cram's and Mr. Goodhue's work. This difference has grown more and more pronounced until for the last few years each has worked in absolute independence of the other. It is perhaps natural, therefore, though regrettable that they should wish to work alone. Mr. Goodhue will continue his practice as Bertram Grosvenor Goodhue, while Mr. Cram and Mr. Ferguson will be known as Cram & Ferguson.

THE LAW OF ARCHITECT, OWNER AND CONTRACTOR.*

BY CLINTON H. BLAKE, JR.
(Of the New York Bar).

(Continued)

It has already been noted (supra) that, as a result of defects in his plans, an architect may be debarred from recovering his compensation for them and it is also true that for these defects he may also be liable in damages. (Shipman v. State, 43 Wis., 381; Niver v. Nash, 35 Pac. Rep. Wash. Sup. Ct., Dec. 1893, 380.) This liability, providing the defects upon which it is based would be patent to one skilled in the art though not apparent, perhaps, to one lacking such expert training, would not it seems be affected by the fact that the building had been accepted and the superintendence of it ratified. (Shipman v. State, 43 Wis. 381.)

Where there are mistakes in plans and specifications increasing the cost of the building and which proper skill and care would have obviated, the architect is, apparently, liable (Erskine v. Johnson, 23 Neb. 265); and likewise it has been held to be a breach of the duty which he owes to his employer, if he allows a foundation to be so constructed as to not be deep enough, or protected sufficiently otherwise, to prevent the cracking of a wall which it supports. (Schreiner v. Miller, 67 Iowa 91.)

In an action to recover damages for the negligence of an architect in the preparation of plans, the measure of damages has been fixed at an amount equal to the difference between the value of the building, as designed and constructed, and the amount of the value as it would have been, if the building had been properly designed and constructed. (Larrimore v. Comanche County [Tex. Civ. Apps. Sep. 1895] 32 S. W. 367.) While the rule is clear that damages may be recovered which are the result of defective plans and specifications, yet it must not be supposed that such damages can be recovered if, in the erection of the building and without the fault of the architect, there has been a substantial variance from the plans and specifications as submitted by the architect. This is on the theory, largely, that an architect in warranting the safety or proper construction of the building which he designs, warrants it on the assumption and understanding that all of the substantial conditions stated, shown, or included by him in the specifications, and which in his opinion may be absolutely necessary and essential to the proper construction of the building, shall be carried out and observed.

Where damage of this character is claimed, the burden is upon the plaintiff to prove a substantial compliance with the plans and specifications. The leading case on this point, and a case in which the law is stated at some length and with great clearness, was decided by the Court of Appeals of New York State in October, 1893. In that case, an action was brought against the architects, a firm, to recover damages claimed to have resulted by reason of defective plans, specifications, and drawings, prepared by them for an opera house. The sole defect complained of was in regard to the plan of the precenium arch which was in segmental form, thirty-six feet long with a rise of eight feet. It was built of brick and, upon the removal of the cradle supporting it, fell, necessitating its reconstruction. In the court below, the plaintiff recovered as damages, a sum equal to the cost of rebuilding it and the added cost of repairing the injury which its fall caused to the other parts of the building.

The plaintiff, an assignee, based his claim in particular upon the failure of the defendants to make provisions, in the plans and drawings, for a blind arch over the segmental arch, on the theory that if such had been shown and provided for, it would have been constructed and no damage would have resulted. The plaintiff gave evidence in the court below which tended to show that the fall of the arch might have been due to the fact that it was too flat and that the spring necessary for self-support in an arch of the width of the one in question, could not be given by a rise of eight feet therein. The plaintiff was also allowed to give evidence that the arch was so planned and constructed that its thrust fell without, instead of within, the abutments upon which it rested, and that its fall may have been due to this fact also. The plan of the arch required that stone skew backs be put in at each heel, at the points where the arch met the abutments. It appeared that the purpose of these skew backs was to furnish a firm foundation for the arch and to distribute its thrust over a larger area of the abutments. One of the defendants, a man of large experience, testified to the preparation of plans for and the building of many theaters and opera houses and the placing in many of them of segmental arches having no greater rise than the one in question, without experiencing any difficulties, and he also testified that he always made provision in such plans for stone skew backs and considered them elements of vital importance to the support of the structure. It appeared that in building the arch in question, these skew backs were omitted and that the responsibility for their omission rested with plaintiff's superintendent. Experts testified that skew backs of stone were necessary to the proper construction of the arch, bearing out the testimony of defendant on this point. The court below submitted the question to the jury on the finding that the arch fell on account of the omission of the stone skew backs, holding that there was sufficient evidence to support a finding to that effect and instructing the jury that if they found this to be the case, the plaintiff could not recovery. The jury evidently did not so find for they gave judgment for the plaintiff. Judge Maynard of the Court of Appeals in reviewing this decision said:

> "But we think it was error to submit this question to the decision of the jury. When it was conceded that the plaintiff's assignor had not followed the plans in this respect, and it appeared that the failure to put in the stone skew backs may have caused the loss, which the plaintiff is seeking to impose upon the defendants, they were

*This series of articles began in the June (1913) number.

entitled to a ruling as a matter of law, that the plaintiff could not recover, and the complaint should have been dismissed. He had failed to establish a performance of the condition precedent, which was essential to the support of his cause of action. One of the principal allegations of the complaint had been left unproven. The action is ex contractu, and the defendants cannot be made liable upon a contract which they never assented to. There is no principle upon which a case of this kind can be excepted from the rule, so firmly established, that every stipulation which the parties have inserted in a contract by way of conditions to be performed is to be deemed material. (Dauchey v. Drake, 85 N. Y. 407; Hill v. Blake, 97 id. 216; Tobias v. Liesberger, 105 id. 404; Bank of Montreal v. Recknagel, 109 id. 482; Clark v. Fry, 121 id. 470; Norrington v. Wright, 115 U. S. 188; Glaholm v. Hays, 2 M. & G. 265.) The plaintiff's assignor was contracting for the exercise of the technical knowledge and skill of the defendants, and it was upon the infallibility of their own judgment that the defendants relied when they made their guaranty that if the arch was constructed in accordance with their directions it would stand. They regarded a stone skew back of vital importance for its security and stability, and their promise to make good any loss which might occur if it fell, was upon condition that this method of construction was adopted, and we are not permitted to say that they would have entered into the agreement had they known that these essential supports were to be omitted.

"It is not necessary to hold that a literal performance of the condition was required. A variance, confessedly immaterial, or a departure from the plans in a separate and independent part of the building, having no structural relation to the defective member, would present a different case for our consideration. But where the variance is not disputed, and involves the integrity of the mode of construction of the affected part, and is so far material that it may have been the direct cause of the injury for which the owner seeks to hold the architect responsible, it must be held, we think, that the plaintiff has failed to establish the cause of action upon which he relies."

(Lake v. McElfatrick, 139 N. Y. 349 reversing 46 St. Rep. 437, 19 N. Y. Supp. 494.)

In another State the Court seems to have gone so far as to substantially assume, as a matter of legal inference, that the architect is negligent where the walls of a building crack on account of a defective foundation (Schreiner v. Miller, 67 Iowa, 91); but the New York doctrine would seem certainly to be the more equitable, safeguarding as it does the architect against claims for damage occasioned through no fault of his own, considering fully each case in the light of the special facts appearing, and keeping more clear the distinction between the architect and the owner and the particular duties of each, in determining whether the damage is or is not traceable to a lack of skill or neglect on the part of the architect.

Where, on account of defects or oversight, it is necessary that repairs be made, the claimant cannot make these repairs at an unnecessary expense, or in an unnecessarily extravagant form, and recover as damages the amount of his disbursements in so doing. He must, rather, confine his claim to such sum as will represent the cost of effecting the repairs as economically as it is possible to effect them, consistent with proper workmanship and construction, and it should also be borne in mind, that the architect does not guarantee satisfaction, and that in the absence of special circumstances or agreements, his duty is fulfilled when he has prepared the plans and carried out the provisions of his contract with reasonable skill, diligence, and care.

Superintendence.

The rule requiring the exercise of reasonable care and diligence on the part of the architect in the preparation of plans (Johnson v. Wanamaker, 17 Pa. Super. Ct. 301) is equally applicable to his position as superintendent. (Straus v. Buchman et al, 96 N. Y. App. Div. 270; Gilman v. Stevens, 54 How. Pr. [N. Y. Super. Ct.] 197; Merriman v. Fowler, 37 N. J. L. 89; Combes v. Beede, 89 Me. 187.) If such reasonable care and diligence be not observed, the architect will be liable to the owner for such damage as may result to the latter by reason of such neglect. (Merriman v. Fowler, 37 N. J. L. 89; Lottman v. Barnett, 62 Missouri 59.) It is not necessary, however, for the architect to give to the matter of superintendence more than reasonable and ordinary care, or exercise therein more than reasonable and ordinary diligence; nor do ordinary care and diligence require that he superintend the work so closely as to follow every movement of every workman and be able to discover all variations of every character from the contract provisions and all defects in execution, including such defects as can only be detected by the exercise on his part of extraordinary diligence. (Petersen v. Rawson, 34 N. Y. 370, reversing 2 Boswell, N. Y. 234; Hubert v. Aitken, 15 Daly, N. Y. 237; Stewart v. Boehme, 53 Ill. App. Court 463; Vigeant v. Scully, 20 Ill. App. Court 437.) On the other hand he cannot escape liability for damage resulting from steps taken subject to his direction or on his advice and approval, on the mere plea that he was not present when the damage resulted; and where a wall fell as a result of a jackscrew worked under the supervision of one employed by the owner on the advice of the architect, and subject to the latter's direction, and it was shown that the architect approved the use of the jackscrew, he was held liable in damages for the death of a workman as a result of the falling of the wall, despite the fact that the architect was not present at the time the accident occurred. (Lottman v. Barnett, 62 Mo. 159.)

The question of whether or not there has been negligence or want of skill, in a given case, is a question of fact and not of law. (Straus v. Buchman, 96 N. Y. App. Div. 270; Hubert v. Aitken, 15 Daly 237; 19 St. Rept. 914; 2 N. Y. Supp. 711, affirmed (on re-argument) 5 N. Y. Supp. 839, 15 Daly 241, affirmed by Court of Appeals, 123 N. Y. 655) but the matter of negligence while a question of fact and, consequently, a question for the jury, should not be left to the latter in such a way as to refer to them the question of what it is proper or improper in the broad sense for the architect to do, entirely unrestrained by the evidence or special circumstances of the case; and where, on the facts, it appears that the architect has used reasonable diligence, care, and skill, it is improper to leave it to the jury to decide whether he has properly performed his duties. (Vigeant v. Scully, 20 Ill. Apps. 437.)

The burden of proof in a proceeding to recover damages for negligence or want of skill on the part of the architect is upon him who seeks to establish it (Gilman v. Stevens, 54 How. Pr. N. Y. Supr. Ct. 197 at 207); although on the other hand, it is no answer to a charge of negligence to plead reliance on the statements of others. (Moneypenny v. Hartland, [reported twice], 1 C. & P. [Carrington & Payne] 352; 2 C. & P. 378; Hubert v. Aitken, 15 Daly [N. Y.] 237, judg. aff'd, 123 N. Y. 655.)

To avoid the charge of negligence it is not essential, however, that the architect prove the exercise of "the utmost skill such as only a few members of any profession attain to," but he must show what "other architects will generally consider to be a reasonable degree of professional knowledge and skill." (Clark on Architecture, page 28).

In this connection it should be noted that what might perhaps be a reasonable degree of skill in one locality, would not be in another. For instance, the degree of attention which an architect may properly give to country work, unhampered by city ordinances, would not be at all sufficient for work done in a large city, under local rules, regulations and building ordinances, which must be given strict attention by the architect, if he is to secure the rights of his client and the proper conduct of the work.

It may happen that the superintendence of a building will be in the hands of an architect who did not prepare, and had no part in the preparation of, the plans, but the fact that the plans were made by another architect before the superintending architect took charge, will not relieve the latter of responsibility for defects in the building as erected under his supervision (Scott v. Christ's Church Cathedral, 1 L. C. L. J. 63); and while the architect is not held to the necessity of preventing every slightest shade of variation from the plans and specifications, he must, nevertheless, bestow such care and attention as may be necessary to detect variations or faults which are of such a character as to be of real importance and materiality. (Peterson v. Rawson, 34 N. Y. 370; Wait Eng. & Arch. Jurisprudence, 839, page 759.)

The architect and the builder may be jointly and severally liable to the owner in the case of neglect contributable to them jointly. In New Jersey, this doctrine has been applied to the extent of holding, that, where a joint neglect by the builder and architect is proven, a suit may be maintained against the architect alone, and that the fact that the owner has, at the same time, held back from the contractor a part of the money due to the latter, upon the ground that the contractor is equally liable with the architect, will be no bar to the action against the architect himself. (Newman v. Fowler, 37 N. J. L. 89.) So where a floor has sunk on account of the insufficiency of timber used, the architect and the builder have been held jointly and severally liable for the damages resulting. (David v. McDonald, 8 L. C. [Lower Canada] Jurist 44, 14 L. C. Rep. 31.)

In New York, in a somewhat similar case, decided in July, 1904, where it was proven that the architect visited the building as superintendent on an average, substantially, of at least once a day, but, between his visits, important floor timbers were placed, and in such a manner as to be in direct violation of law, and this occurred after the owner had taken possession, and necessitated the making of important repairs, the Court stating the rule that reasonable care and diligence must be exercised by the architect in the superintendence of the work, and that the question whether or not the architect is negligent is a question of fact to be passed upon by the jury, held that:

> "It was the duty of the defendants under their contract with plaintiff, not only to see that the beams were properly placed, but especially to see that the placing of them conformed to the requirements of the statute. This they failed to do. . . . The evidence . . . established the fact that numerous and extensive repairs were made necessary by reason of the defective work, the cost of which and other work necessary for putting the building in the condition in which it would have been had the defendants performed their contract, would have justified a larger verdict. The plaintiff was entitled to recover a sum which would leave him as well off as he would have been had the defendants fully performed their contract."

(Strauss v. Buchman, 96 N. Y. App. Div. 270 at 273-274, citing 8 Am. & Eng. Enc. of Law, 2nd Ed. 634.)

The duty of the architect in regard to the material used applies, of course, to the character of the material itself, as well as to the manner in which it is used in the work of construction, and the measure of damages for neglect in permitting the use of inferior material or labor is a sum equal to that which will be required to properly repair and make a good job of the work in question. (Gilman v. Stevens, 54 How. Pr. [N. Y.] 197.) Where, by the contract, the superintendent, as a part of his duties, is required to furnish monthly estimates of the work done, this provision is not necessarily, it seems, to be taken as meaning that "he must furnish correct and accurate estimates," the monthly estimates referred to being in their nature and of necessity, mere approximations. (Shipman v. State, 43 Wis. 381, and see 1 Redfield on R. R., 6th Ed. § 116.)

On the broad general question of the degree of care and diligence required of an architect in the performance of his duties as superintendent and supervisor of construction, one of the leading cases, if not the leading case, in the American Courts, is a case which came before the Court of Common Pleas of the City and County of New York, in 1889. Following the first decision in this case a re-argument was held and the judgment affirmed and later the same judgment was again affirmed in all ways by the Court of Appeals. The plaintiffs were the architects who prepared the plans for, and supervised the construction of, the building. After the completion of the building it was discovered that the flues, which connected with the boiler flues, were not sufficiently large to meet the purposes for which they had been designed. The defendant claimed that no recovery could be had for the reason that the contract was entire and that the plaintiffs had not performed their contract, in that they were negligent in the designing and construction of the flues. The flues were not omitted from the plans, but were set down with the same detail as were the other parts of the building. The court held that it could not be said that the plaintiffs had not entirely performed their contract as to the plans; that they had performed it completely, but that they performed it negligently, and that while the defendant was entitled to deduct the amount of the damage caused by the faulty design of the chimney from the amount due under the contract, for the drawing of the plans and the superintending of the construction of the house, nevertheless, the defect in construction could not be urged to defeat all recovery on the contract. Speaking of the amount of diligence and care required of the architects in their superintending capacity, the court gave the following very clear statement of the law by which the duties of the architect, in this respect, are governed :

> "The learned counsel would not claim that an architect is bound to spend all his time at a building which is going up under his professional care, so that no fraud or negligence can be committed by any of the contractors. The counsel would not contend that the architect is an insurer of the perfection of the mason work, the carpenter work, the plumbing, etc. He is bound only to exercise reasonable care and to use reasonable powers of observation and detection, in the supervision of the structure. When, therefore, it appears that the architect has made frequent visits to the building, and in a general way has performed the duties called for by the custom of his profession, the mere fact, for instance, that inferior brick have been used in places, does not establish, as a matter of law, that he has not entirely performed his contract. He might have directed at one of his visits that portions of the plumbing work be packed in wool; upon his next return to the building the pipes in question might have been covered with brick in the progress of the building. If he had inquired whether the wool-packing had been attended to, and had received an affirmative answer from the plumber and the brick-layer, I am of opinion that his duty as an architect, in the matter of the required protection of said pipes from the weather,

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would have been ended. Yet, under these very circumstances, the packing might have been intentionally or carelessly omitted, in fraud upon both architect and owner, and could it still be claimed that the architect had not fully performed his work? The learned counsel for appellant is, in effect, asking us to hold that the defects of the character above named establish, as matter of law, that plaintiffs have not completely performed their agreement. An architect is no more a mere overseer or foreman or watchman than he is a guarantor of a flawless building, and the only question that can arise in a case where general performance of duty is shown is whether, considering all the circumstances and peculiar facts involved, he has or has not been guilty of negligence. This is a question of fact, and not of law. Upon consideration I am more fully convinced of the correctness of our conclusions reached after the former argument."

Hubert v. Aitken, 5 N. Y. Supp. 839. Opinion Larramore, C. J. 840, affirming 2 N. Y., Supp. 711; 15 Daly [N. Y.] 237, [including both original opinion and affirming opinion of Larramore, C. J.]; judgment affirmed without opinion, 123 N. Y. 655.)

Another leading case, also in New York, and decided by the Court of Appeals, is illustrative of the same doctrine. In this second case, through an error, the front parlor windows of a building were so constructed so as to be 2¾ inches higher than was shown by the plans, and the same distance higher from the floor than the back parlor windows. It appeared that the plaintiff—the architect—had been diligent in his attention to the details of superintendence, and that the defect was caused by the masons not having accurately followed and conformed to the plans and specifications. The court held, one Justice dissenting, that the defects in question were not chargeable to the plaintiff and that they afforded the defendant no justification for withholding from the architect payment of the amount agreed upon as the latter's compensation for his serviecs. The Court said:

"The plaintiff agreed to make 'the plans, sections, elevations, specifications, and to superintend the progress' of the building to be erected. It was not his duty to do the work. The agreement between the defendant and his masons provides that the masons 'shall well and sufficiently erect and finish' the building in question, 'agreeably to drawings and specifications made by Frederick Petersen.' It was not the duty of the plaintiff to 'lay out' the work, as it is technically termed. This, it was expressly provided, should be done by the mason, who agrees 'to lay out his work himself.'

"The plaintiff was bound to furnish the plans, specifications and elevations, and the mason was bound to lay out the work. In other but perhaps not plainer words, the plaintiff was bound to put down, and to show on paper, how every part was to be built, and the mason was to stake it out, measure his lumber, and make actual measurements on the ground and in the erection for such building. I do not think it was the duty of the plaintiff to measure the joists or timbers of which the different stories were to be constructed, and to determine by actual measurement that the ceiling of the first story had an elevation of thirteen feet, and the second had an elevation of eleven feet, or to measure the thickness and depth of the brick or stone walls. . . . The first story windows in the front parlor were to be sixteen inches from the floor, and the windows themselves were probably ten or eleven feet in height. The plaintiff came from day to day to superintend the progress of the work, and while thus superintending, was he bound to have ascertained that the window sills in the front parlor were two and three-quarter inches higher from the floor, than was authorized by the plan? To an inexperienced eye the difference would not have been perceptible; but should the knowledge and skill of a good architect at once have detected it? The testimony is not satisfactory to establish the affirmative of this proposition. Wm. Thomas, an architect, says, 'that he does not consider that the building has been properly superintended. If it had been, the mistake would have been found out when the first story beams were on. Comparing the second story beams, I should have found it out.' Mr. Windham, an archi-

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tect, thinks the difference in height between the parlor windows in front and in rear, ought to have been discovered as soon as they began to lay the brown stone in front. Mr. Ritch, on the other hand, also an architect, says, 'that it is impossible to say when the error should have been discovered. It might have passed the observation of the architect, till the building was completed. It is an error likely to pass any one's observation. It would most likely pass his notice until the cornices were put up.' These were the only architects who testified on this point. It was proved by various witnesses that the plaintiff was diligent in his attendance upon the building. The respectable and intelligent referee who had the witnesses personally before him, and was able to form a better opinion of their intelligence and integrity than one who did not see them, must have held that the plaintiff was not bound to have discovered this defect. Mr. Traphagen testified that he told the plaintiff the balcony was too high, and that he said it was all right. He was one of the contractors for the mason work, and it was apparently a question whether the fault was on his part or that of the plaintiff. The referee did not rely on his evidence. He found that the plaintiff had bestowed as much personal attention upon the building as was necessary, and that the variations mentioned were not caused by carelessness, negligence or inattention on his part. I do not find it necessary to differ with him."

(Peterson v. Rawson, 34 N. Y. 370, at pages 372, 373, and 374.)

It will sometimes happen that a change of more or less importance which has been requested by the owner, as for instance, a change in the location of gas or electric outlets, may be overlooked by the architect. If the change be spoken of and brought to the attention of the architect before the plans and specifications are approved and then these plans and specifications, not including the change, are examined and approved by the owner, the latter, by his approval, following his examination of them, may estop himself from later claiming damages from the architect for the latter's failure to provide the change required. This rule, of course, would not be applicable to a situation where the owner, to the knowledge of the architect, signed the contract and approved the plans and specifications without reading or examining them, and in reliance on the assurance of the architect that everything necessary and desired had been included and provided for. Where the change is requested after the plans and specifications have been approved and the contract signed, it is, of course, the duty of the architect to see that the proper instructions of his client are carried out, the work under these circumstances being in the nature of an extra; and for negligence or improper skill or lack of diligence in carrying out the directions of the owner, the architect will be liable within the ordinary rule requiring the exercise by him of reasonable skill and diligence.

(*To be continued*)